

Statement of the Natural Heritage Institute

Regarding the Scope of the Actions to Cover in the BDCP

- 1) To resolve the scope of actions that physically alter the delta and that should be covered in the BDCP, it is useful to consider basic realities of the BDCP process:
 - At bottom, the BDCP is intended to be at least a contractual framework wherein permit applicants (and federal agencies seeking concurrence on RPAs) will commit to restoration actions in or affecting the delta that they are not otherwise legally required to undertake, in exchange for regulatory assurances which they are not otherwise legally entitled to receive.
 - Thus, the scope of the “covered activities” is bounded by the reach of the permitting authority of the federal, state and local agencies that sign the BDCP agreement.
 - So we can define the scope of covered actions by who is and is not at the table. To be sure, if the BDCP parties wish to include within the scope particular activities that lie within the permitting jurisdiction of agencies not yet at the table, we can request their participation and ultimate execution of the agreement. One obvious candidate for such an invitation is the U.S. Army Corps of Engineers, if we wish to include Corps--permissible actions in the Agreement.¹

Defining the scope of covered actions in terms of types of permits (and consultation concurrences), such as incidental take permits, makes more sense than defining the scope in terms of specified projects, such as the SDIP. A list of covered projects will obsolesce very quickly, given the highly dynamic character of the delta. A Bay-Delta HCP/NCCP agreement should have enough shelf life to be worth the time and effort required, without requiring amendment every time a new project emerges.

- 2) However, to the extent that the BDCP does want to create a list of covered actions, regulatory assurances may be particularly appropriate for actions to restore the landforms in the delta for habitat improvement (as well as water supply reliability). For instance, subsidence reversal projects are likely to require regulatory permits, just like other actions that affect the physical status quo of the delta. Thus, actions to restore landforms and habitats in the delta that are subject to the permitting authority of the agencies participating in the BDCP should be explicitly included within the scope of the covered activities.

¹ However, agencies exercising quasi-adjudicatory functions, such as the SWRCB with respect to water rights permits or change orders, may decline to join the process as an ultimate signatory, on the grounds that such orders probably cannot be negotiated outside of an adjudicatory process.

- 3) To make the process manageable, BDCP should confine its scope to actions that affect the viability of covered species. Human beings are not a species of survival concern and will probably not be on that list. Hence, actions that affect source drinking water quality, for instance, while a vitally important concern, should not be tackled in the BDCP. Similarly, actions that affect the safe consumption of fish by humans (e.g. bioconcentration of heavy metals) would not seem to fit with the scope.